Supreme Court, U.S.
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No. 96-1032

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

THE CINCINNATI ENQUIRER, etc.,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, et al.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Respondents are four Ohio government officials: George Voinovich, the Governor of Ohio; Reginald Wilkinson, Director of the Ohio Department of Rehabilitation and Corrections; Arthur Tate, Warden; and Terry Collins, Warden. They are responsible for the administration of 28 penal institutions located in Ohio, which house approximately 45,000 inmates. *See* Petition 18a. In that capacity they were parties to the underlying litigation in this case, in which a class of prison inmates sued them for injuries and damages arising from a riot at one of Ohio's prisons. They were represented by the Ohio Attorney General in that action, and they are represented by her in opposing this Petition.

In the underlying litigation, Respondents agreed to proceed with alternative dispute resolution efforts in the case, specifically a non-binding summary jury trial, on the condition that the proceeding be a closed hearing. Their fear in making public the summary jury trial was that it would be disruptive to the present and future administration of the prison system. All parties to this proceeding agree that the purpose of the summary jury trial in this case was to facilitate settlement of the underlying lawsuits against the State respondents. That purpose, it now appears, has been fulfilled. As reported by Petitioner on January 22, 1997, the underlying lawsuit will be settled for $4.1 million. *See* Appendix A-1.

REASONS FOR DENYING THE WRIT

A. There is no Lower-Court Conflict of Authority.

Conspicuously missing from the Petition is any argument that the lower courts are struggling with the issue presented. Petitioner does not allege, let alone begin to establish, a lower court split of authority. Indeed, from all

that appears in the Petition, the First Amendment right of access to summary jury trials is a matter that has been addressed by one federal judge in one district court (Spiegel) and one circuit court (Guy, Ryan, Surheinrich). And even they were all of one mind. Review of the issue at this point, in other words, is premature. The issue should be allowed to percolate in the lower courts where, if Petitioner is correct about the significance of the issue and the frequency with which it comes up, additional decisions will be issued and possibly even a division of authority will arise.

B. This Case Does Not Present a Good Vehicle for Addressing the Question Presented.

Even overlooking the lack of a lower-court conflict and even assuming the significance of the federal question presented, the Petition is not worth granting. The purpose of a summary jury trial, as Petitioner itself acknowledges, is to facilitate the settlement of cases. Petition 13. That purpose now appears to have been fulfilled, making this case far less of a live controversy than it was last summer. As reported by Petitioner, the State has agreed to settle with the inmates for $4.1 million. As a result of that settlement, there is no longer a live dispute between the parties to the underlying litigation. Under these circumstance, it is not clear whether Petitioner's First Amendment right of access claim retains any vitality. At most, they could now attempt to seek access to the sealed transcript of the summary jury trial in order to provide after-the-fact reporting on the case. While that interest may suffice to create an Article III case or controversy, it is a long way from the kind of concrete, ongoing dispute that normally warrants the Court's attention.

C. The Sixth Circuit's Decision is Consistent With This Court's Precedents.

At any rate, the lower courts correctly resolved the question presented, making it even less imperative to review this issue further. In doing so, the Court adhered to this Court's time-tested analytical framework for resolving right-of-access cases under the First Amendment. *See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*") Under that framework, a claim of access involves two "complimentary considerations." First, the proceeding must be one for which there has been a "tradition of accessibility." *Id.* at 8. Second, public access must play a "significant positive role in the functioning of the particular process in question." *Id.* Even if these elements are satisfied, the right of access is qualified, and may be outweighed by a strong interest in maintaining the confidentiality of the proceedings. *Id.* at 10-11. As the lower courts correctly recognized, each of the elements outlined in *Press-Enterprise II* is lacking in this instance.

To begin with, there is no tradition of access to summary jury trials. They are devices to aid the settlement of disputes. *See* Lambros, *The Summary Jury Trial, A Report to the Judicial Conference of the United States*, 103 F.R.D. 461, 465 (1984). And settlements have historically been closed to the press and public. *Palmieri v. New York*, 779 F.2d 861, 865 (2d Cir. 1985); *Cincinnati Gas and Elec. Co. v. General Elec. Co.* 854 F.2d 900, 903-904 (6th Cir.1988).

Despite superficial similarities to a jury trial, the summary jury trial is fundamentally different. The mock jurors are given the evidence in summary form, do not hear live witnesses, and sometimes hear evidence that would be inadmissible at a real trial. *See Cincinnati Gas and Electric,*

854 F.2d at 904; *The Summary Jury Trial*, 103 F.R.D. at 483-84; Spiegel, *Summary Jury Trials*, 54 U.Cin.L.Rev. 829, 830-31 (1986). Although they render a "verdict," it is not binding on the parties, and serves only to facilitate pretrial settlement of the litigation "much like a settlement conference." *Cincinnati Gas and Electric*, 854 F.2d at 904.

More fundamentally, the summary jury trial does not present the Court with any matter for adjudication, nor does it have a final and decisive effect on the outcome of the case. *In re the Cincinnati Enquirer*, 94 F.3d 198, (6th Cir. 1996); *Cincinnati Gas and Electric*, 854 F.2d at 904. The jury renders only an advisory verdict, and the parties' rights to a full trial *de novo* remain unaffected. *The Summary Jury Trial*, 103 F.R.D. at 482. The "tradition of accessibility" element of the *Press-Enterprise II* analysis clearly has not been met in this case.

Nor is the second criterion present. The State Respondents specifically agreed to the summary jury trial only on the condition that it be held in confidence. Petition 20a. When the court was ordered to conduct the summary jury trial in public, the State Respondents were granted a writ of mandamus to stop the summary jury trial altogether. Petition 31a. As the court stated in *Cincinnati Gas and Electric*, 854 F.3d at 904, "where a party has a legitimate interest in confidentiality, public access would be detrimental to the effectiveness of the summary jury trial in facilitating settlement." Indeed the parties cannot be forced to engage in a summary jury trial, *In re NLO, Inc.*, 5 F.3d 154 (6th Cir. 1993), and will be less likely to agree to such a procedure if confidentiality is denied.

Finally, the cases relied on by Petitioner for a contrary view are inapposite. All address the First Amendment right of access to criminal jury trials, not civil

settlement procedures. *See Richmond Newspapers, Inc. v. Virginia* 448 U.S. 555 (1980) (dealing with public and press access to a criminal trial); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (dealing with access to criminal trials involving sex offenses); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("*Press-Enterprise I*") (dealing with right of access to the voir dire of potential jurors in a criminal case); *Press-Enterprise II*, 478 U.S. 1 (dealing with right of access to preliminary criminal hearings).

CONCLUSION

For the foregoing reasons the writ should be denied.

Respectfully submitted,

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APPENDIX

The Cincinnati Enquirer
January 22, 1997
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INMATES SETTLE FOR $4.1 M
Award for Lucasville riot victims is largest ever

By Ben L. Kaufman
The Cincinnati Enquirer

The state will pay $4.1 million to settle claims by inmate victims of the 1993 Lucasville uprising.

It will be the largest post-riot award to prisoners anywhere in the country, Cincinnati lawyer Alphonse A. Gerhardstein, who was lead attorney, said Tuesday.

The settlement is small compared to the more than $50 million Ohio promised to spend to settle a separate class action Mr. Gerhardstein brought to improve inmate psychological services.

He said a court-appointed claims administrator would send payments to more than 400 prisoners whose property was trashed largely by guards, to more than 50 inmates injured in the riot and aftermath, and to families of nine inmates murdered by fellow prisoners.

Assuming U.S. District Judge S. Arthur Spiegel approves the settlement, Mr. Gerhardstein said checks should go out before year's end.

"Every inmate who was trapped in the riot should get some money, and they won't," Mr. Gerhardstein said. "We got the people who were seriously harmed."

No money will go to inmates convicted of crimes related to the Easter riot or 11-day uprising, the longest in American history, he added.

Since it cost less than a trial and appeal, the

settlement was "in the best interests" of the citizens of the state, the Department of Rehabilitation and Correction (DRC), and the Southern Ohio Correctional Facility in Lu-
(Please see LUCASVILLE, page B6)

Lucasville: Inmates settle for $4.1M
Continued from Page B1

casville, DRC Director Reginald Wilkinson said.

Mr. Gerhardstein, a veteran inmate advocate, led a legal powerhouse team assembled by the court to represent the inmates. Others were civil rights attorney Marc D. Mezibov, class action specialist Stanley M. Chesley and lawyers in his office, and litigator Neal Baker from Dinsmore & Shohl.

Of the $4.1 million, at least $300,000 will reimburse lawyers for their out-of-pocket expenses, plus $1.4 million to cover their fees at normal hourly rates.

The rest will go to the inmates, less the costs of administering the claims, Mr. Gerhardstein said, "and everybody is committed to keeping this as small as possible."

Judge Spiegel held a closed summary jury trial in August to promote a settlement. Both sides present their evidence and arguments, and jurors reached an advisory verdict.

None of the lawyers would confirm that the inmates won, but Mr. Gerhardstein said the verdict helped both sides appreciate what was feasible. In that sense, he said, it moved them closer to the settlement urged by Judge Spiegel.

More important are improvements in prison life that the state promises to make in the settlement, Mr. Gerhardstein said.

These include a limit on one inmate per cell for maximum-security prisoners. Before the riot, two sometimes-hostile maximum-security prisoners were housed in each one-man Lucasville cell.

The state also pledged to refine inmate classifications, speed transfers from Lucasville for inmates whose classifications are upgraded from maximum security, and to address parole problems for inmate victims of the riot.

Further improvements include a fair procedure for hearing allegations of inmate rule violations, better mental health care for inmate riot victims, programs to improve racial and cultural relations, and at least 40 hours a week out of cells for all Lucasville inmates.

Mr. Gerhardstein said Ohio promised to reconsider its directives on inmate religious practice. This will help prison staff recognize and accommodate sincerely held but unconventional beliefs and support chaplains and other who must cope with unfamiliar demands and faiths embraced by prisoners.

Finally, Mr. Gerhardstein said, the state promised to study the ways inmates adjust -- or fail to accommodate -- to long sentences.

The settlement is to be filed with Judge Spiegel today. A fairness hearing could come by early April after inmates have had the 60-day comment period required in any class action settlement.